IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 75

WILMETTE PARK DISTRICT,
Petitioner

vs.

NIGEL D. CAMPBELL, COLLECTOR OF INTERNAL REVENUE,
Respondent

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HENRY J. BRANDT,
GILBERT H. HENNESSEY, JR.,
ROBERT F. FUCHS,
Attorneys for Petitioner.

POPPENHUSEN, JOHNSTON, THOMPSON & RAYMOND,
Of Counsel.

Chicago, Illinois.

THE BLAKELY-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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OPINIONS BELOW.

The opinion of the District Court (R. 25-27; 41-44) is reported in 76 F. Supp. 924, and the opinion of the Court of Appeals (R. 63-69) is reported in 172 F. 2d 885.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 23, 1949 (R. 69), and a petition for rehearing was denied on March 18, 1949 (R. 70). The petition for a writ of certiorari was filed on May 18, 1949 and was granted on June 20, 1949 (R. 73). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution, Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Internal Revenue Code:

§ 1700. Tax

There shall be levied, assessed, collected, and paid—

(a) Single or season ticket; subscription—(1) Rate. A tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription * * *. 40 STAT. 319 (1917).

(This rate was increased to "1 cent for each 5 cents or major fraction thereof" by Section 302 of the Revenue Act of 1943, c. 63, 58 Stat. 21.)

§ 1701. Exemptions from tax

No tax shall be levied under this subchapter in respect of—

(a) Religious, educational, or charitable entertainments. Except in the case of admissions to any athletic game or exhibition the proceeds of which inure wholly or partly to the benefit of any college or university (including any academy of the military or naval forces of the United States), any admissions all the proceeds of which inure (1) exclusively to the benefit of religious, educational, or charitable institutions, societies, or organizations, societies for the prevention of cruelty to children or animals, or societies or organizations conducted for the sole purpose of maintaining symphony orchestras and receiving substantial support from voluntary contributions, or of improving any city, town, village, or other municipality, or of maintaining

a cooperative or community center moving-picture theater * * * if such admissions are not to wrestling matches, prize fights, or boxing, sparring, or other pugilistic matches or exhibitions and no part of the net earnings thereof inures to the benefit of any private stockholder or individual; or (2) exclusively to the benefit of persons in the military or naval forces of the United States; or (3) exclusively to the benefit of persons who have served in such forces and are in need; or (4) exclusively to the benefit of National guard organizations, Reserve Officers' associations or organizations, posts or organizations of war veterans, or auxiliary units or societies of any such posts or organization, if such posts, organizations, units or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private stockholder or individual; or (5) exclusively to the benefit of members of the police or fire department of any city, town, village, or other municipality, or the dependents or heirs of such members. * * * 44 STAT. 92, *as amended*, 47 STAT. 271, 26 U. S. C. 1701 (1940). (This provision was substantially repealed on Sept. 20, 1941. 55 STAT. 710.)

§ 1704. Admission defined

The term "admission" as used in this chapter includes seats and tables, reserved or otherwise and other similar accommodations, and the charges made therefor. 40 STAT. 300, 319 (1917), *as amended*, 53 STAT. 191 (1939). (26 U. S. C. 1946 ed., § 1704.)

§ 1718. Penalties * * *

(c) Any person who willfully fails to pay, collect, or truthfully account for and pay over, any tax imposed by this chapter, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected, or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected * * * (26 U. S. C. 1946 ed., § 1718).

QUESTIONS PRESENTED.

1. Whether the Federal Admissions Tax Statute, 26 U. S. C. 1700, should be construed to require the payment of a federal tax on a charge made by a local government for the use of park facilities operated for the public benefit and not for profit.

2. Whether the federal government has the constitutional power to burden a local government by taxing its citizens' right to use park facilities which are provided for their benefit at less than cost.

3. Whether the federal government may constitutionally enforce collection of a penalty against another sovereign by seizure of the latter's general funds.

STATEMENT.

Petitioner is a body politic and corporate organized in 1908 under the provisions of an Illinois statute enacted in 1895. Ill. Rev. Stat. (1945) c. 105, Secs. 256-295 (R. 41). It is administered by a Board of Commissioners elected by residents of the district (R. 41). Four public parks fall under the Board's jurisdiction (R. 12, 51). The northern portion of Washington Park, the largest of the four, fronts on Lake Michigan and extends along the lake shore for approximately three-fourths of a mile (R. 42). Petitioner acquired jurisdiction over three hundred feet of the shoal waters off Washington Park by grant of the Illinois General Assembly (1895, June 24, Laws 1895, p. 272, § 19; Chap. 105, § 273, Ill. Rev. Stat. 1941). The Washington Park land area was obtained in part by grant from the State of Illinois and in part by condemnation and purchase (R. 42). For more than twenty-five years the riparian portion of this park area has been used in conjunction with the shoal waters as a bathing beach (R. 42). The authority for the operation of this beach is granted by the same statutory provisions which authorize petitioner to conduct the other familiar recreational facilities found in Washington Park (Chap. 105, Sec. 11-5, Ill. Rev. Stat. 1947). Petitioner's beach is one of twenty-nine municipal beaches operated on the shores of Lake Michigan between Gary, Indiana and Lake Bluff, Illinois (R. 43). In connection with it, petitioner supplies various facilities including a bathhouse, showers, toilets, life saving equipment, and an automobile parking area (R. 42). Petitioner also employs such personnel as are necessary to operate and to police these facilities (R. 42).

Like some of the other beaches operated by park systems in the Chicago area, petitioner makes a charge for the privilege of using the beach and its facilities (R. 42). The charges are collected through the sale of tickets of various kinds. In 1943 a $1.50 ticket entitled one person to use the "beach and bathhouse privileges" throughout the season (R. 14 (a)). A $4.00 ticket authorized an entire family to use such facilities during the 1943 season (R. 14 (a)). If the family also wanted the privilege of entering and making use of automobile parking space, the ticket price was 50% higher (R. 14 (a)). Tickets were also sold on a daily fee basis (R. 42).

The trial court found that these charges were intended to be merely compensatory. It stated:

> "The charge made by the Park District for use of the beach and beach facilities is made to cover maintenance, operation, and some capital improvements. Over the years the charge for the use of the beach and beach facilities is intended merely to approximate these costs, and not to produce net income or profit to the Park District." (R. 42-43.)

In fact the revenue obtained from these charges has been insufficient to meet current expenses. As a result petitioner has found it necessary to draw upon its general funds in order to maintain the beach (R. 14 (b)). These general funds are raised by taxation on real property (R. 19).

On July 24, 1941 the Collector of Internal Revenue directed petitioner to collect from the users of its beach a federal admissions tax on all beach tickets sold thereafter (R. 43). Petitioner did not comply with this order nor has it ever set aside any part of the beach revenues for the payment of any tax or penalty imposed by the federal government (R. 62). Subsequently the Commissioner of Internal Revenue assessed and collected from petitioner, under the supposed authority of the penalty section of the

Internal Revenue Code, 26 U. S. C. 1718, penalties in an amount equal to that which it was asserted should have been collected (R. 43-44). Because the Collector threatened to make a distraint levy on its bank account if it did not do so, petitioner was compelled to pay these sums out of its general funds (R. 18). After refund claims for the years 1941 to 1945, inclusive, had been rejected, petitioner instituted this action against the Collector in the United States District Court for the Northern District of Illinois (R. 43-44).

The District Court held that the compensatory fees charged for the privilege of using petitioner's beach were not admissions within the meaning of the Federal Admission Tax Statute, and therefore that respondent had no authority to collect penalties from petitioner (R. 25-27; 44-45). The United States Court of Appeals for the Seventh Circuit reversed (R. 63-69).

SPECIFICATION OF ERRORS TO BE URGED.

1. The Court below erred in failing to decide in favor of petitioner the questions enumerated in the Questions Presented.

SUMMARY OF ARGUMENT.

I.

This Court has recently held that if a statute's literal reading leads to an unreasonable result it will not be adopted. The documented purpose of Congress in enacting the admissions and dues tax statutes as part of a wartime tax program was to tax the luxury of patronizing commercial entertainment establishments. The administrative interpretation of the statute, insofar as it is consistent, supports this conclusion. Moreover, other provisions of the act make it obvious that Congress never intended to levy any tax on fees paid for the use of municipal park facilities.

This Court should not disregard convincing evidence of Congressional intent merely because it is possible to raise difficult constitutional questions under a permissible, though unreasonable literal reading of the statute.

II.

A. Certain State activities which are peculiarly suited to performance by a local sovereign are immune from taxation by the Federal Government. The maintenance of a public park, and as an incident thereto a bathing beach, is such an activity.

B. The character of an immune activity is not affected by the fact that private agencies perform a similar function for profit.

C. A Federal tax which is added to the compensatory fee charged to the beneficiaries of the immune functions directly burdens the local sovereign because it tends to frustrate that government's policy of performing an essential service for its citizens at a minimum cost to them.

D. The National Government does not acquire the right to burden an immune activity with taxation merely because the local sovereign raises money for its maintenance by charging a compensatory fee to the beneficiaries of the activity.

E. Recognition of the immunity heretofore enjoyed by petitioner and other local sovereigns comparably situated will withdraw no revenue from the field of Federal taxation. But the addition of this area to the taxable field will unconstitutionally impair the sovereignty of local governments.

F. Power to punish the Sovereign States was never granted by them to the Federal Government.

I.

The Statutory Question.

The admissions tax statute imposes a twenty per cent levy on "the amount paid for admission to any place." In arguing that this language applies to the compensatory fees charged by petitioner for the use of its beach, respondent has heretofore placed his sole reliance on a literal reading of the statute. As the Court has recently indicated in answer to a comparable argument, if such a reading leads to an unreasonable result in a situation not specifically considered by Congress, it will not be adopted.

In *Foley Bros.* v. *Filardo*, 336 U. S. 281 (1949) the court held that the words "every contract to which the United States * * * is a party * * *" did not apply to certain contracts to which the United States is a party, namely, contracts for construction in a foreign country. Although the words of the statute were clearly applicable to the contract in question, there was no additional evidence of Congressional intent to apply the statute to that type of contract.

In the instant case respondent has apparently taken the position that the statute applies to every fee imposed for the privilege of entering any defined area. This position is clearly erroneous. In providing for an admissions tax Congress undeniably intended to exclude some such fees. These limitations appear upon a consideration of the history of this act.

The admissions tax appeared for the first time in the Revenue Act of 1917. (40 STAT. 300, 319-320.) The sources of revenue to which Congress turned to finance the prosecution of World War I were, in the words of President Wilson, "war profits and incomes and luxuries."[1] Taxes on admissions to places of entertainment, on cabarets and on private club dues clearly come under the heading of luxury taxes.

Provision for these three taxes, the admissions tax, the cabaret tax and the dues tax was made in Title VII. The same rate was prescribed for all three taxes and the three were grouped together. All three may be properly characterized as wartime luxury taxes.

In the original 1917 version of the admissions tax statute, Congress used the same broad language contained in the present act. In fact the language of the two acts is identical except that the rate was doubled in the current act. The 1917 statute provided for:

> "* * * a tax of 1 cent for each 10 cents, or fraction thereof of the amount paid for admission to any place. * * *" 40 STAT. 319.

If construed literally, these words would have required the collection of a penny tax from every person paying

1. It was expressly stated in Senate Report No. 767, 65th Cong. 3d Sess., at page 22, that both the House Ways and Means Committee and the Senate Finance Committee intended to follow President Wilson's recommendations to tax "war profits, incomes and luxuries."

ten cents to a street car conductor for admittance to a public conveyance. They would have required the payment of a ten per cent tax on tolls charged by local governments for the privilege of entering upon a toll bridge or a toll road. Literally such charges are amounts paid for admission, but it is plain that Congress did not intend so all inclusive a levy.

The House Report on H. R. 4280, which became the Revenue Act of 1917, demonstrates that the legislators wanted to tax the luxury of being entertained, rather than the necessity of using essential transportation facilities. In recommending the adoption of the admissions tax, the Ways and Means Committee of the House plainly identified the types of admissions that should be taxed. The Report states:

> "It is recommended that this tax be imposed upon all places to which admission is charged, such as motion picture shows, theatres, circuses, entertainments, cabarets, ball games, athletic games, etc." H. R. Rep. No. 45, 65th Cong. 1st Sess. (1917), 8.

Respondent would have the court interpret this statute and its re-enactments as though the House Committee had omitted the words "such as motion picture shows, theatres, circuses, entertainments, cabarets, ball games, athletic games, etc." These words were included in the Report to identify the type of admissions which Congress wanted to tax. If the legislators had intended the broad language of the statute to apply literally and without any reasonable limitation, the recommendation of the Committee would simply have been that the "tax be imposed on all places to which admission is charged." It is impossible to ignore the difference in meaning between (a) "all places" and (b) "all places such as motion pictures, theatres, circuses, etc." Respondent favors the former; the House Report adopted the latter.

It is, of course, not contended that the enumeration of examples was intended to be an exhaustive list of taxable admissions. But it was plainly intended to characterize the type of admissions which should be subject to the tax. All the examples listed in the Report dealt with spectator admissions. In that respect this characterization was comparable to that adopted in the English statute where "the expression 'admission' means admission as a spectator or one of an audience." *Attorney General* v. *Southport Corp.* (1934) I. K. B. 226, 236. The nearest thing to a definition of the term "admission" in the 1917 American statute also identifies the character of the tax. Congress did not adopt a technical definition which would cover all fees exacted as a condition precedent to entrance into any and all enclosures. Instead, it merely provided that the "term 'admission' as used in this title includes seats and tables, reserved or otherwise, and other similar accommodations and the charges made therefor." In so doing, as was the case in enacting the other provisions of the statute, Congress expressed its central purpose of imposing a luxury tax on entertainment charges.

The admissions tax, which had its origin as a war-time luxury tax, is essentially an entertainment tax. It applies to every payment made for the privilege of entering a theatre, night club, or other inclosure for the purpose of enjoying commercial entertainment. The tax does not apply to compensatory fees paid by citizens who utilize recreational facilities in public parks. The tax applies to the luxury of patronizing private, commercial amusement activities; it does not apply to the use of public park facilities.[2]

2. The contrast between taxable commercial amusement facilities and exempt public park facilities is illustrated by a comparison of the activities which the House Report indicated should be taxable ("motion picture shows, theaters, circuses, entertainments, cabarets * * *") with the park activities which the Illinois

This conclusion is amply supported by the absence of evidence of affirmative purpose by Congress to tax compensatory charges for the use of public park facilities. If Congress had intended to interfere with such a basic function of local government, it would have expressed that intent in specific language, either in the statute itself or in the committee reports. And if the Commissioner of Internal Revenue had thought that Congress meant to tax such activities, he would have tried at an early date to tax fees charged for admission to and use of municipal tennis courts and golf courses. The Commissioner has never attempted to tax such fees either as "admissions" or as "dues". S. T. 357, I-1 C. B. 434, although the privilege of playing golf or tennis as a member of a private club is taxable under the dues tax provisions. 53 STAT. 192, *as amended*, 55 STAT. 711 (1941), 26 U. S. C. § 1710, 1712.

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statute specifically authorizes petitioner to maintain. See Ill. Rev. Stat. Ch. 105, Sec. 11-5.

"Submerged Land Park Districts shall have power to plan, establish and maintain field houses, gymnasiums, assembly rooms, *comfort stations*. indoor and outdoor swimming pools, wading pools, bathing beaches, bath houses, locker rooms, boating basins, boat houses, lagoons, skating rinks, piers, conservatories for the propagation of flowers, shrubs, and other plants, animal and bird houses and enclosures, athletic fields with seating stands, golf, tennis and other courses, courts, and grounds, and the power to make and enforce reasonable rules, regulations and charges therefor. The express enumeration of each of the foregoing recreational facilities and equipment which park districts are herein given the power to provide shall not be construed as a limitation upon said park districts or any other form of park destrict described in this code, nor prohibit any park district from providing any other athletic and recreational facilities or equipment which may be appropriate in any park acquired, laid out, established, constructed and maintained by any park district, nor shall the same in any way be held to limit the power and authority by this code conferred upon park districts." (Emphasis added.)

It should be noted that most of these park activities may be performed in an enclosed area, and thus may literally be subject to an admissions tax.

In specifying that the dues tax should apply to such private fees, Congress referred indiscriminately to "golf, tennis, polo, swimming, or other athletic or sporting privileges or facilities." 26 U. S. C. 1712. Nowhere in the statutory scheme did Congress indicate that there should be any difference in treatment of golf and swimming. Nor during World War I and the years preceding World War II did the Commissioner find any reason to draw any such distinction. During World War II, however, the Commissioner apparently decided that compensatory fees charged by public parks for swimming privileges should be treated in the same way that Congress, during World War I, had decided that fees for commercial or private club entertainment should be treated. He therefore has attempted to draw a wholly indefensible distinction between golf greens fees and swimming fees. His present position that swimming fees are taxable as "admissions" is inconsistent with his ruling that golf greens fees are not taxable, S. T. 357, I-1 C. B. 434, and also with his previously consistent practice of not taxing swimming fees.

Consistent administrative interpretation may be a valuable aid to the judicial task of construing a statute. Administrative interpretation of the Admissions-Cabaret-Dues Tax statute, to the extent that it is consistent, supports the conclusion that Congress never intended to levy any tax on fees paid for the use of municipal facilities.

This conclusion is inescapable if the statute is considered as a whole. Certain specific exemptions allowed by Congress in the Revenue Act of 1921, 42 STAT. 1120, can be explained only on the theory that Congress assumed that municipal activities, such as charges for the use of park facilities, were themselves exempt from the tax burden. The exemption section, since repealed, provided in part that:

"No tax shall be levied under this subchapter in

> respect of * * * any admissions all the proceeds of which inure (1) exclusively to the benefit of * * * societies or organizations conducted for the sole purpose of * * * improving any city, town, village, or other municipality, or of maintaining a cooperative or community center moving picture theater. * * *" 42 STAT. 1120, 26 U. S. C. 1701.

It is undisputed that all the proceeds of the charges for the use of petitioner's beach are utilized to support that park activity. The funds are therefore used for the sole purpose of improving the municipality. The only reason for saying that petitioner does not fall squarely within the language of this exemption is that the Wilmette Park District is not a "society or organization".

In terms the exemption applied to charges made by a civic organization for the purpose of improving the municipality. It did not apply to charges made by the municipality itself for the same purpose.[3] As applied to petitioner's beach, the exemption would have been expressly applicable if a non-profit civic organization were formed for the sole purpose of operating the beach. The exemption would have been applicable if petitioner made use of such an organization to raise the funds for the support of the beach; it was not applicable where the municipality itself handled the ticket sales.

The reason for this superficial anomaly is perfectly clear. The municipal activity was never taxed and the purpose of the exemption was merely to give civic organizations performing municipal functions the same immunity which the municipality itself enjoyed. The only possible explanation for an exemption which applied to a park activity spon-

3. Respondent adopted this construction by serving notice on petitioner to collect a tax on all "admissions" on and after July 25, 1941. Since the exemption provision was in effect at that time and until the enactment of Revenue Act of 1941 on September 20, 1941, 55 STAT. 687, it is apparent that the Collector construed the exemption as inapplicable to petitioner.

sored by a civic organization, but not to an identical park activity sponsored by the local government itself, is that Congress assumed that there was no need to exempt the government activity because it had not been nor had Congress intended that it should be taxed in the first place.

Although this special exemption to civic organizations had nothing to do with the exempt status of a municipal corporation, it does furnish a valuable aid in ascertaining the meaning of the words "amount paid for admission to any place." When the provision for exempting the civic organization was repealed on September 20, 1949 the repeal, of course, had no effect upon the well understood immunity of the municipal corporation.[4]

Since the charge made by Wilmette Park District is not an "admission" within the meaning of § 1700, it is immaterial what it is called. It cannot be imposed by petitioner for the privilege of entrance. The only statute authorizing any fees whatsoever limits petitioner to charges made for use of its facilities. (Chap. 105, § 269, Ill. Rev. Stat. 1947)[5] The tickets state on their face that the charge is made "for beach and beach house privileges" (R. 14 (a)) which include the bath house, toilets, washrooms, lockers, and other

4. Inasmuch as the Collector's order directing petitioner to collect the admissions tax was made on July 24, 1941, it is assumed that respondent will not contend that the removal of the exemption on September 20, 1941 had any effect on petititioner's tax liability.

5. Cf., The obligatory charge under Ill. Rev. Stat. Ch. 105, Sec. 8-d (1947) which statute provides: "Each park district which issues bonds and constructs a swimming pool under Section 8-7 hereof *shall charge for the use thereof* at a rate which at all times is sufficient to pay maintenance and operation costs, depreciation, and the principal and interest on the bonds. Such district may make, enact and enforce all needful rules and regulations for the construction, acquisition, improvement, extension, management, maintenance, care and protection of its swimming pool and for the use thereof. Charges or rates for the use of the swimming pool shall be such as the board may from time to time determine by ordinance." (Emphasis added.)

facilities (R. 42). The findings of fact specifically characterize the charge imposed by petitioner as one for "use of the beach and beach facilities" (R. 42, 43).

The charge is similar to fees collected from users of public toll roads, toll bridges, and parking areas. The parking area maintained by the Chicago Park District at Grant Park may be entered and used by the driver of an automobile only after paying a charge of fifty cents. He then may make use of the parking facilities for ten minutes or twenty-four hours—exactly as a purchaser of a daily beach ticket may make use of petitioner's beach facilities for the same period. Though each of the fees in these examples is literally an "amount paid for admission to any place" no admissions tax is levied on any of them.

Congress, then, never intended to tax this charge. And as will be demonstrated below, it never had the power to do so.

II.

The Constitutional Question.

A.

Under the federal system local governments have the primary duty of providing for the health, safety, and general welfare of the people. This duty is discharged by courts, police and fire departments, public schools, park districts, sewage systems, waterworks, and other activities maintained for the benefit of the local population.

These public services are immune from federal taxation. This Court has always recognized that the Federal Government was not granted any power to tax the more basic services performed by local governments. No judge has ever suggested that the power of the Federal Sovereign to tax the sovereign States is unlimited.

That an area of State immunity exists was recognized by the entire Court in *New York* v. *United States*. *See* 326 U. S. 572, 583, 587-588, 590-598.[6] This area includes the maintenance of public parks.

Mr. Chief Justice Stone, in an opinion joined by Justices Reed, Murphy and Burton listed "public parks" among the State activities which were constitutionally immune from "a general non-discriminatory real estate tax (apportioned), or an income tax levied upon citizens and States alike." He stated:

> "A state may, like a private individual, own real property and receive income. But in view of our former decisions we could hardly say that a general non-discriminatory real estate tax (apportioned), or an income tax laid upon citizens and states alike could be constitutionally applied to the state's capitol, its state house, its public school houses, *public parks*, or its revenues from taxes or school lands, even though all real property and all income of the citizens is taxed." (326 U. S. at 587-588. Emphasis added.)

This statement plainly identifies the maintenance of public parks as the type of governmental service which constitutionally cannot be burdened by Federal taxation.

And for good reason. Parks have played an important part in community living throughout Anglo-American history. Before the adoption of the Constitution and indeed before the discovery of this country our English forbears maintained so-called Commons in which the public held common rights. From this origin by gradual process of development nearly every village, town and city has established commons, squares or open places for the recreation of the public. Such places, now uniformly called parks, have been maintained at public expense and by general

6. "All agree that not all of the former immunity is gone." Mr. Justice Rutledge concurring at page 584.

taxation.[7] With the increased complexity of modern life, the maintenance of parks where the entire family may find relaxation, aesthetic enjoyment, and physical exercise is more important than ever before. Park activities make a real contribution to the health, both mental and physical, of the residents of modern municipalities.

The national government is without power to limit the extent of that contribution by exacting tribute from the local sovereign for performing these functions. The state has the same right to minister to the health and recreational needs of its citizens as it has to provide for their safety and education. The operation and maintenance of schools, parks, sanitation facilities, police and fire protection; these are all activities of the same fundamental character.

Moreover, it is clear that the various public park activities which contribute to fulfilling the basic objectives of modern park programs are entitled to the same immunity as the park system itself. The right of the state to maintain public parks includes the lesser right to maintain such recreational facilities as golf courses, tennis courts, swimming pools, bathing beaches, bird houses, conservatories[8] and other facilities. Since some find relaxation in passive pursuits while others prefer athletic endeavors, a typical public park will offer both types of activities for the bene-

7. It is too late to contend that the operation of parks and park facilities universally carried on by local governments in all the States of the Union is the conduct of a business; a commercial activity. *See e.g., Commissioner* v. *Schnackenberg*, 90 F. 2d 175 at 176 (C. A. 7, 1937).

8. See Ill. Rev. Stat. Ch. 105 § 269 where the authority of park districts to perform these and similar park functions is expressly recognized. Insofar as our particular situation is concerned, it should be noted that Illinois cases are uniform in recognizing that in operating a bathing beach, a park district acts as a sovereign and not as an entrepreneur. *See e.g., Gebhardt* v. *The Village of La Grange Park*, 354 Ill. 234 (1933); *Hendricks* v. *Urbana Park District*, 265 Ill. App. 102 (1932).

fit of the entire community. It cannot be said that there is any significant difference between the bathing beach maintained by petitioner at Washington Park and any of the other normal activities supplied there and at other public parks. In fact such public beaches or municipal pools can be found in nearly every community.

B.

Neither the character of a public function, nor its immunity from federal taxation, is affected in the slightest by the fact that private agencies may perform similar functions for the purpose of making a profit. The maintenance of private schools by non-government agencies does not relieve the local government of its obligation to provide for the education of its citizens. Nor does the existence of private sanitation facilities diminish the importance of health functions performed by the state. It is equally clear that the place of the public park in modern society is not changed by the fact that businessmen sometimes capitalize on the health and recreational wants of the public by operating amusement parks or picnic areas for profit.

Though such private agencies may supplement its work, the local sovereign cannot be said to be relieved of its primary responsibilities because of their existence.[9] The existence or non-existence of such private agencies has no effect on the tax immunity of the local sovereign in performing such essential governmental functions.

9. In fact the state has undertaken most of its responsibilities only because private agencies failed to meet completely the needs of its citizens.

C.

A federal tax on the right to use public park facilities directly burdens the local government notwithstanding the fact that the actual payment of the tax is made by persons who use the facilities. The tax is a burden on the local government because it tends to frustrate an important governmental policy. The municipality's objective is to provide bathing facilities for the use of the general public. The effect of the federal tax is to erect a financial barrier between the public and those facilities. Such a barrier clearly has a tendency to deny some families access to the beach, contrary to the policy of the local government.

Respondent has argued that the admissions tax is not an "undue interference" with petitioner's policy of furnishing bathing facilities because the tax is actually payable by the persons who make use of the beach.[10] If this argument is sound, it applies whether petitioner makes a charge for the use of the beach or not. The argument is that a tax on the right to go swimming at a public beach is not a burden on the local sovereign because the tax is paid by the swimmer. Respondent is thus arguing that the federal government has the constitutional power to tax the right of every citizen to go swimming at a public beach, or for that matter, to make use of any other park facility, whether or not a charge is made. Yet it must be too clear for argument that if the national government has the power to tax the citizen who seeks to enter and use the courts, the schools or the public parks, the exercise of that power hinders and interferes with the activities of local government.

Nor is there any justification for suggesting that the burden on the state is not "undue" because the tax is relatively modest. One could hardly devise a more effec-

10. Brief for Respondent in opposition to Petition for Certiorari, p. 10.

tive interference with the state's desire to furnish bathing facilities to the public than the imposition of a twenty per cent levy, unless it would be an even higher levy, and the court has not heretofore evidenced any disposition to determine the question whether a tax burdened an immune activity simply by considering whether the amount of the tax was so high as to result in an undue burden. The state's immunity from taxation is not to be destroyed by any formula which merely renders it immune from destructive taxation. It is clear that the twenty per cent tax involved in this case is high enough to substantially curtail the use of petitioner's beach. Moreover, such curtailment will in all probability affect the ability of the local sovereign to finance the project.[11]

The vice of the admissions tax as applied to public park activities would, of course, become more and more apparent as the amount of the levy increased. A ten dollar tax on the right to play golf on a municipal golf course or a five dollar tax on the right to go swimming on a municipal beach would deny millions of Americans a regular and valued form of recreation. Such an interference with the state's function of ministering to the health and recreational needs of its citizens would plainly be unconstitutional. This is true even though it is equally clear that the federal government has the power to impose a ten dollar tax on private country club memberships or even on the right to enjoy some form of amusement such as the opera or a championship boxing match. The constitutionality of the tax is not dependent on its amount; it depends on the character of the activity which it burdens.

11. This tax would not be imposed if petitioner had diffused the beach's operating costs by general taxation. If the Collector is sustained, the Federal government will have been able to compel the activity to be financed, if financing is possible at all, by a general property tax levy which petitioner does not consider appropriate for this purpose.

D.

The Federal Government does not acquire the right to tax a State activity which would otherwise be immune merely because the local government partially supports that activity by charging a compensatory fee to persons who benefit from it. It is plain that the character of an immune activity is not affected by the method in which it is financed. If a state activity is immune from federal taxation when operating costs are met from general tax revenues, it is no less immune because the local government decides to defray its costs, in whole or in part, by imposing a fee on those directly benefited.

Many municipalities maintain court systems particularly designed for the adjudication of small claims. Costs are reduced to a minimum so that such courts will be available to as large a segment of the community as possible. These costs are imposed on the litigants because it is only proper that those who make use of the courts shall share in some measure the financial burden of their support. Yet any increase in court costs necessarily tends to deprive some citizen of his day in court. To superimpose a federal tax would obviously have the same effect. And though the tax be paid by the litigant, it would hamper and curtail the capacity of local government to serve the people.

Many states find it desirable partially to meet the cost of public education by the imposition of small fees. They are rarely compensatory and never designed to make a profit. By this means the state merely asks the primary beneficiaries of its educational program to bear a share of the burden of supporting it.

These examples illustrate that the method of financing a governmental activity has no bearing on the question whether it is immune from federal taxation. In considering this constitutional question, it is of no importance

whether the activity is supported in its entirety by general taxation, by special annual assessments levied on those who benefit from it, or by a use tax or fee collected every time anyone enjoys its benefits. It is the character of the function which is decisive.

When a state conducts a business enterprise such as selling liquor, mineral water or grandstand seats, immunity cannot be claimed merely because the trading venture is carried on by a state. Such a commercial activity conducted for the purpose of making a profit is fundamentally different from the type of public service performed by petitioner. Its beach activity was not conducted for gain and in fact the operation has regularly resulted in a deficit. The fees imposed by petitioner had neither the purpose or effect of making a profit. The imposition of such partially compensatory fees does not destroy the immune character of the public park activity.

In terms of the character of the state activity involved and in terms of the nature of the burden on that activity, the differences between the instant case and *Allen* v. *Regents*, 304 U. S. 439 (1938) are perfectly clear. The park activity here involved is itself an immune function of government. In contrast, the business of sponsoring athletic spectacles is not immune even though the proceeds of the business may be used to support an immune activity. This rather obvious, though crucial, distinction has been stated succinctly by Professor Powell. Referring to the opinion of Mr. Justice Roberts for the court in the *Allen* case, Professor Powell writes:

> "The immunity, he says, 'does not extend to business enterprises conducted by the States for gain.' *The business enterprise to which he refers is not education, but the athletic contests.* Immunity cannot be claimed for the proceeds of business enterprise, even if those proceeds are used for a concededly governmental function. Mr. Justice Butler, in dissenting,

either misses the point or rejects it when, by way of comparison, he says that 'It is hard to understand how the collection by the State of fees for the privilege of attendance brings, even for the purpose of Federal taxation, its work of education to the level of selling intoxicating liquor * * * operating a railway * * * or conducting any other commercial enterprise.' "

Powell, *The Waning of Intergovernmental Tax Immunities* (1945), 58 HARV. L. REV. 633, 647.

Mr. Justice Butler correctly argued that the collection of fees could not convert an immune activity such as public education into a commercial enterprise. But neither could the application of the proceeds of a business venture to an immune activity render the business itself immune. If a state runs a business that business is taxable no matter what disposition is made of its profits.

Moreover, the admissions tax imposes a burden on petitioner which is entirely different from that imposed on the State of Georgia in the *Allen* case. The burden imposed on Georgia was the burden of collecting the tax from non-student patrons of its athletic contests. The tax was not levied on students seeking educational benefits, or even on students seeking admissions to the football games as spectators. Unlike the situation in the instant case, the tax on the *Allen* case raised no barrier between the state's activities and its intended beneficiaries. The only barrier raised by the tax was between the general public and the opportunity to watch a spectacular event. The general public had no constitutional right to watch a spectacular event put on for profit without paying the admission tax.

Since the character of the activity and the nature of the burden in the instant case are basically different from that in the *Allen* case, the result must also be different. Citizens have a constitutional right to enter and enjoy a public park on the terms and conditions prescribed by the local

government which maintains the park. To the extent that the federal government taxes this right, and thus erects a financial barrier around the state park, the policy of the local government to make its park facilities generally available is frustrated. The frustration of this basic state policy is clearly an unconstitutional burden on the local sovereign.

E.

Since public parks have always been exempt from Federal taxation, the specific recognition of this immunity will not reduce the sources of Federal revenue in the slightest. Considerations which motivated the decision of *South Carolina* v. *United States*, 199 U. S. 437 (1905), and *New York* v. *United States*, 326 U. S. 572 (1946), are therefore inapplicable here. In those cases the Court was concerned with the possibility that States, by embarking in businesses which had previously been subject to the Federal taxing power, would greatly extend the area of immunity and thus eliminate important sources of Federal revenues. No such possibility exists with respect to public parks because their immunity has been traditionally recognized.

The discussion of the *South Carolina* case by the Court of Appeals for the Second Circuit in *Commissioner* v. *Shamberg's Estate*, 144 F. 2d 998 (1944), is pertinent here. In that case the Court held that interest on obligations of The Port of New York Authority were not subject to the Federal income tax. The following statements emphasize the contrast between a private, profitable business which has always been taxable, and a public activity which is historically and properly immune from Federal taxation:

> "The Commissioner also relies on *State of South Carolina* v. *United States*, 199 U. S. 437, 26 S. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737, as indicating that the exemption should not be applied to state activities

which are not wholly essential to its sovereignty. The argument is based on the claim that the exemption provision must be interpreted in the light of that decision, which it is said governed the extent of the constitutional power to tax at the time when the exemption statute was enacted. We have already said that, in our opinion, the exemption provision was not limited to cases where federal taxation was constitutionally possible in 1913, but covered a broader field where taxation of obligations was doubtful and subject to contention by the states. But even assuming the government's interpretation of the exemption provision as merely enacting the constitutional doctrine as of 1913, we do not think that the *South Carolina* case would permit taxation of such a state agency as the Port Authority. That decision related only to the power of the government to impose the usual license taxes upon dispensaries established by the state for the wholesale and retail sale of liquor. It held that such a state agency was subject to the tax, and that the constitutional limitation did not extend to instrumentalities used by the state in carrying on an ordinary private business. This was plainly a commercial business which resulted in one year of a profit of about $500,000 which was divided between the state and local municipalities. Such a holding seems to us far from indicating that it was ever applicable to agencies having customary governmental activities, such as development of roads, bridges and waterways entered upon with no profit motive.

* * * * *

"Indeed, in *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 173, 29 S. Ct. 458, 53 L. Ed. 742, decided in 1909, the South Carolina decision was explained upon the ground that a state had no power by legislation in regard to the sale and consumption of liquor to destroy a pre-existing right of taxation of the federal government. Any claim that the South Carolina decision governs the present case proves too much, for, if it be read as permitting taxation of almost every governmental activity, it would certainly fly in the face

of the practice of the Treasury Department for the last forty years and the opinions of the two Attorney Generals acted upon by the treasury, since it has never been held, nor is it here contended, that income from such state agencies as irrigation and levee districts is not exempt, although neither of these activities, nor even the existence of the districts, is essential to the state. Here the actvities, even though some of them might have been exercised by private corporations under appropriate legislation, are exercised for a public purpose by an agency set up by the states and given many public powers, though not of taxation or control through the suffrages of citizens. It minimizes its public and political character to treat such an agency as a private corporation merely because of the lack of taxing power which is only one of the attributes of sovereignty." 144 F. 2d at 1005.

In short, the states never granted to the Federal Government the power to tax this sort of activity. And Congress, in enacting the Admissions tax, did not attempt to exercise such power.

F.

Petitioner did not collect any tax in connection with the sale of its tickets nor did it make any profits from the operation of the beach. Consequently if petitioner is to be held liable for penalties which respondent seeks to impose, those penalties must be paid out of petitioner's funds which are derived from general property taxes.

But the Federal Government has no power to infringe the sovereignty of a local government by imposing a penalty which can only be paid out of its general funds. Assuming that petitioner has a duty to pay such a tax, or to satisfy a judgment for a tort, nevertheless such a duty can not be enforced by a sheriff's levy, or by the collector's distraint levy, on petitioner's general funds any more than it can be enforced by a levy on a school house, a water purification plant, or a court-house. One of the chief

attributes of sovereignty is insulation from such process; the sovereign is not much a sovereign if it can be compelled by force or by threat of force to offer up its funds. Nor, if we are to be protected "from clashing sovereignty", see *M'Culloch* v. *Maryland*, 4 Wheat. 316, 429 (1819), can one sovereign have any greater power to punish another sovereign or to seize its property than any ordinary citizen has. The delicate nature of the relationship between the federal union and the sovereign states comprising it requires the federal government to pay an even more exacting respect to this attribute of sovereignty. *Cf., Kentucky* v. *Dennison*, 24 How. 66 (1861); *Luther* v. *Borden*, 7 How. 1 (1849); *Coleman* v. *Miller*, 307 U. S. 433 (1939).

Conclusion.

For the above reasons it is respectfully submitted that the judgment of the court below should be reversed and that petitioner's claim for refund be granted.

HENRY J. BRANDT,
GILBERT H. HENNESSEY, JR.,
ROBERT F. FUCHS,
Attorneys for Petitioner.

POPPENHUSEN, JOHNSTON, THOMPSON & RAYMOND,
Of Counsel.